88-136

In the Supreme Court of the United States

of America

October Term, 1988

No. 88-

Bill Horner, Petitioner

v.

State of Tennessee, Respondent

Petition for Writ of Certiorari

to the Tennessee Court of Criminal Appeals

Bill Horner
In Propria Persona

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Questions Presented for Review

I. When a trial judge, after having granted a defendant's motion for rights sua sponte, fails to timely advise that defendant of his rights, is the defendant's right to due process prejudiced?

II. When a defendant in a criminal trial, appearing in propria persona, timely demands that a layman be allowed to assist him, does the trial judge's denial of that demand prejudice the defendant's right to the assistance of counsel?

III. Has a defendant's right to equal protection of the law been violated when an appellate court ignores a prior decision of the State Supreme Court in interpreting a statute in the face of that defendant's timely demand for equal treatment under the law?

IV. When a trial court denies a jury trial to a defendant who has been indicted by a grand jury, and where no evidence of implied consent exists

upon the records of the court, is the defendant's right to trial by jury prejudiced?

V. Where criminal actions are brought in the name of the State of Tennessee versus an individual, and where no evidence of implied consent exists, does the Supreme Court of the United States have original jurisdiction of the case pursuant to Article III, Section 2, clause 2 of the Constitution of the United States of America?

Table of Contents

Table of Authorities Cited

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Petitioner requests that a writ of certiorari issue to review the judgement of the Tennessee Court of Criminal Appeals in this case, and the judgement of the Tennessee Supreme Court in denying the defendant-appellant permission to appeal.

Unpublished Opinion of the Court of Criminal Appeals

The Tennessee Court of criminal appeals issued an opinion on January 27, 1988, affirming the Judgement of the Hardeman County, Tennessee, Circuit Court, where the defendant, Bill Horner, had been convicted of "overtaking and passing on the right," in violation of Tennessee Code Annotated 55-5-118. The defendant's petition for rehearing was denied by the Tennessee Court of Criminal Appeals on February 10, 1988. The Supreme Court of the State of Tennessee denied the defendant's permission to appeal on May 9, 1988.

The opinion of the Tennessee Court of Criminal Appeals is included with this petition in Appendix A, pages A-1 through A-7.

Jurisdiction of the Court

Permission to appeal was denied by the Tennessee Supreme Court on May 9, 1988. Petition for Certiorari is due in this Court by July 8, 1988.

The Supreme Court may take jurisdiction pursuant to Article III, Section 2, Clause 3 of the Constitution of the United States.

The Court may also take jurisdiction pursuant to 28 USC S 1257(3).

Constitutional Provisions and Statutes

Constitution of the United States of America

Article III, Section 2, Clause 2 states in pertinent part:

> "In all cases ... in which a State shall be a Party, the supreme Court shall have original jurisdiction. ..."

Article III, Section 2, Clause 3 states in pertinent part:

> "The trial of all Crimes...shall be by Jury. ..."

Article VI, Clause 2 states, in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V states, in pertinent part:

"No person shall ... be deprived of life, liberty, or property, without due process of law; ... "

Amendment VI states, in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the Assistance of Counsel for his defence."

Amendment XIV, Section I, states in pertinent part:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the Great State of Tennessee

Article I, section 6 states, in pertinent part:

"The right to trial by jury shall remain inviolate, ..."

Article I, section 9 states, in pertinent part:

"That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof,... and in prosecutions by indictment or presentment, a speedy and public trial, by an impartial jury of the County in which the crime shall have been committed..."

Article VI, Section 12 states, in pertinent part:

"All writs and other process shall run in the name of the State of Tennessee..."

Tennessee Code Annotated

55-8-118. When overtaking on the right is permitted.-- (a) the driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

(1) When the vehicle overtaken is making or about to make a left turn;

(2) Upon a street or highway with unobstructed pavement not occupied by parked vehicles of sufficient width for

two (2) or more lines of moving vehicles in each direction;

(3) Upon a one-way street, or upon any roadway on which traffic is restricted to one (1) direction of movement, where the roadway is free from obstructions and of sufficient width for two (2) or more lines of moving vehicles.

(b) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving off the pavement or main-traveled portion of the roadway. [Acts 1955, ch 329, S 17; T.C.A., S 59-818.]

Tennessee Rules of Criminal Procedure

Rule 29.1 JURY ARGUMENT

(a) Opening of Argument: Waiver. At the close of the evidence the State shall have the right to open the argument to the trier of facts. If the State desires that all argument be waived, it may offer to waive argument, and if the defendant agrees then no argument will be made. The State may not waive opening argument unless all argument is waived. After the State's

opening argument the defendant may waive argument, in which event the State is not permitted further argument.

Statement of the Case

Arrest

This action was brought against the Defendant as a result of a routine traffic stop which occurred on July 3, 1985, on State Highway 18 North. The Defendant was stopped for overtaking and passing another vehicle on the right. After having stopped the Defendant, the arresting officer discovered that the Defendant had no County privilege tax sticker on his automobile, and charged the defendant with a violation of the county ordinance establishing a Motor Vehicle Tax which was passed on January 16, 1984. Defendant was also charged with driving without a license, but that charge was later dismissed on motion of the District Attorney General.

First Appearance

The Defendant first appeared before General Sessions Court of Hardeman County, (Judge Morris, presiding) on August 1, 1985. When asked to plead to the charges, the Defendant demanded a copy of the

complaint, and was given a copy of the citation written by Deputy Lawson. The Defendant stated that the Citation didn't state which sections of the TCA had been violated, and that he couldn't defend himself properly unless he was told which specific statutes the State was alleging him to have violated. He demanded a copy of the Complaint, pursuant to Article 1, Section 9 of the Tennessee State Constitution. The court informed the Defendant that the citation was the complaint, and stated that if the Defendant wished to "fight this," that he should get himself a lawyer.

Probable Cause Hearing

Defendant again appeared on September 27, 1985. He specifically claimed all of his rights, and notified the Court that he waived none of them. Defendant inquired as to the nature of the charges against him, and was told by the Court that they were criminal in nature. Defendant demanded a grand jury indictment, pursuant to Article I, Section 14 of the Tennessee Constitution. The Court swore in

the arresting officers and took their testimony, at the conclusion of which the Defendant was bound over to the Grand Jury.

Arraignment

The Defendant appeared for arraignment before Judge Jon Kerry Blackwood on January 8, 1986, in the Circuit Court of Hardeman County. Defendant was accompanied before the bar by his friend, Clarence Goodrum. The Court asked who Mr. Goodrum was, and Mr. Goodrum answered. (Appendix, A-24 @ 13) The Court inquired whether Mr. Goodrum was an attorney, and was told that he wasn't, that he was just helping Mr. Horner out as a friend. The prosecutor objected, stating that the State did not recognize unlicensed lawyers. The Defendant made it abundantly clear that he didn't waive any of his rights, including his right to the counsel of his choice. (Appendix, A-24, @ 3-9). Judge Blackwood advised the Defendant that it was the Court's duty to protect his rights, and that he could have any counsel he wished. (Appendix, A-25, @11-

14). The Defendant was not asked to plead against the charges, but was merely ordered to appear for trial. Neither did the Defendant enter any plea sua sponte.

Motions Hearing

The Defendant appeared before Judge Blackwood again on April 18, 1986, at the Fayette County Courthouse for the purpose of a Motions hearing. The motions were heard and disposed of as follows:

1. Motion for Non-Bar Counsel -- denied (Record, p.36)(Appendix, A-26, @10)

2. Motion for Trial Date Set Certain --granted (Record, p.98)(Appendix, A-27, @15-17)

3. Motion for Discovery -- granted (Record, p. 36)

4. Motion for Rights Sua Sponte -- granted (Record, p. 98)(Appendix, A-27, @15-17)

5. Motion to Dismiss for Lack of Subject Matter Jurisdiction -- deferred.(Record, p. 98) (Appendix, A-17 @17 – A 28 @2)

At the Motions hearing, the Defendant announced that he wanted his non-bar counsel to join him in the well of the courtroom. The Court denied the defendant's counsel access to the well of the courtroom, stating that he and the defendant could converse over the rail if need be. (Record, p. 97-98, Appendix, A-27, @ 4-10). The Defendant moved forward over his objection. All motions were disposed of, except for the Motion to Dismiss; Judge Blackwood stated that he'd hear the evidence (?) at the trial. The defendant asked wheather the Court intended to allow him to argue the issues of law involved in the presence of the jury. (Appendix, A-28 @3-5) That's when the Defendant found out that there wouldn't be a jury trial. When asked why, the Court responded that the Defendant wasn't entitled to a jury trial. (Appendix, A-28 @9)

Trial on the Merits

On the day of the trial, May 15, 1986, the court asked the Defendant if he was ready to move forward. He answered that he had an administrative matter to take up, that he wanted the record to show that he'd been denied counsel of his choice, and that he was moving forward over his objection. The Court so noted for the record (Record, p. 99, Appendix, A-29 @1-9). The State called its first witness. The Court did not ask if the Defendant wished to argue his motion to dismiss, nor did the court advise him that it was time to do so.

When the State had rested its case, Judge Blackwood asked the Defendant if he "had any proof". The Defendant stated that he didn't. The Judge ordered the defendant to rise, and announced that he found the Defendant guilty as charged on both remaining counts, and imposed the fines and taxed costs as shown in the order dated May 15, 1986. (Appendix, A-33 @ 13-16 – A-34 @2-4) The Court did not advise the defendant that it was time to

argue against the State's prima-facie case, even though the defendant used that specific example in his motion for rights sua sponte.

Show Cause Order for Contempt

After judgement was rendered, the Court demanded that the defendant show cause why he shouldn't be held in contempt for having published a newspaper article critical of the Court's denial of the defendant's right to trial by jury. (Appendix, A-34 @5-17 – A-35 @1-19)

Notice of Appeal

The Defendant prematurely filed notice of appeal on June 10, 1986.

Motion for New Trial

Motion for New Trial was filed on June 12, 1986. Hearing on the motion was held on September 3, 1986. The defendant and his next friend, James R.L. Plante, entered the well of the courtroom when called, and the defendant introduced Mr. Plante to the court, stating that he wanted Plante to represent

him. Plante rose and advised the court that he wasn't a lawyer and couldn't represent the defendant, but was simply assisting him as his counsel of choice and next friend. The Court said that Mr. Plante could sit with the defendant, but couldn't represent him. (Appendix, A-37 @2-14). The Court "overruled" (which I assume to mean "denied") the motion, and the Defendant objected to the denial. (Appendix, A-A38 @10-18). The order "overruling" the motion was entered on September 9, 1986. The State's attorney offered no comment or argument during this hearing.

Issues Raised on Appeal

The Defendant's appellate brief was filed timely. He timely raised the issue of denial of counsel of choice (Brief of Appellant, p18-21), and demanded that prior decisions of the Tennessee Supreme Court be honored with respect to the definition of the word "overtake," (Brief of Appellant, p 12-14) (Appendix, A-40 – A-43), and that he be accorded equal protection of the law (Appellant's Reply to

Appellee's Supplemental Brief, p.3) (Appendix, A-55 – A-60). He asserted that he was denied due process (Brief of Appellant, p. 22-25) (Appendix, A-44 et seq.), and that he was denied the right to trial by jury (Brief of Appellant, p. 25) (Appendix, A-50 @14-19). The issue of the trial court's failure to perform under it's grant of the defendant' motion for rights sua sponte was raised in the Brief of Appellant, p 25-27 (Appendix, A-51 @18 – A54 @16).

Findings of the Appellate Court

The opinion of the Court of Criminal Appeals was handed down on January 27, 1988, reversing the decision of the Trial Court with regard to the charge of failure to display a county wheel tax decal, and affirming the judgement of guilty with respect to the charge of improper passing. With respect to the denial of counsel, the Appellate Court determined that the defendant wasn't entitled to be represented by others not licensed to practice law. With respect to the failure of the Trial Court to timely advise the

defendant of this procedural rights, they stated that the defendant wasn't entitled to such aid from the trial judge. (Opinion of the Court of Criminal Appeals, Appendix A-1) The Court of Criminal Appeals did not address the defendant's demand for equal treatment under the law.

Petition for Rehearing

The Defendant timely filed a petition for rehearing, re-asserting the accepted definition of the word "overtake." That petition was denied by an order dated February 10, 1988, (Appendix, A-12) in which the court stated that no matters not previously considered had been raised. Petition for Permission to Appeal to the Tennessee Supreme Court was filed by the State of Tennessee on February 25, 1988, requesting permission to appeal the reversal of the wheel tax conviction, and stating that there was every reason to grant the petition. The Defendant also filed an application for Permission to Appeal, but on much broader grounds, on February 29, 1988. The State of Tennessee then

filed a Notice of Objection to the granting of Defendant's appeal, stating that there was virtually no reason to grant permission to appeal in this case. The Supreme Court of the State of Tennessee denied both petitions for permission to appeal on May 9, 1988. ((Appendix, A-13)

Statement of the Facts

1. Defendant was detained and arrested by Deputies Lawson and Smith of the Hardeman County Sheriff's office. (A-33, @6)

2. Defendant passed another vehicle on the right. (A-29, @16)

3. The vehicle passed by the defendant was stopped. (A-30, @7)

4. The State Highway had been widened at the point at which the Defendant committed his alleged offense, by paving the shoulder with gravel. (A-31 @ 10 – A-32 @9)(Exh. 2&3)

5. No unsafe act was committed by the Defendant. (A-31, @ 4-8)

6. No other grounds existed for the deputies to have stopped the Defendant, other than the fact that they saw him go around a stopped car on the right. (A-31 @ 4-8)

7. Defendant was charged with illegal passing of a vehicle on the right, failure to have a county wheel tax sticker, and with driving without a license. (A-30, @ 10-17)

8. Defendant exhibited no other conduct which would have given rise to the detention and subsequent arrest. (A-31, @ 4-7)

9. At the arraignment before Circuit Court Judge Jon Kerry Blackwood, the Court assured the Defendant that he could have any counsel he wished. (A-25, @ 11-13)

10. The Defendant was asked to plead against the charges only one time throughout the entire proceeding -- at his initial appearance before General Sessions Judge Morris. The Defendant did not enter any plea at that time, and was not asked to plead again at any subsequent proceeding.

11. At the Motions hearing on April 18, 1986, the court denied the Defendant's lay counsel permission

to enter the well of the courtroom, and told Mr. Bauer that the accused could converse with him over the bar, if he wished. (A-26, @13 thru A-27, @14)

12. The Court never expressly stated that Mr. Bauer could not assist the Defendant.

13. The Defendant was denied a jury trial. (A-27, @ 15 thru A-28, @9)

14. The Court granted the Defendant's motion for Rights Sua Sponte, and agreed thereby to advise the Defendant of his procedural rights as they became available to him during the course of the proceedings. (A-27, @ 15-17)

15. During the trial of the case in chief, the Court at no time advised the Defendant of any procedural rights. The only questions the court asked of the Defendant were "Are you ready to proceed?" and "Do you have any proof?" (A-28, @10 – A-34, @4)

16. At the hearing of the Motion for New Trial, the Court allowed Mr. James R.L. Plante to sit with the Defendant at the counsel table, but instructed that Mr. Plante could not "represent" the Defendant. (A-37, @ 2-16)

17. Mr. Plante stated that he was not the Defendant's attorney or agent, and that he wasn't a member of the bar nor a graduate of a law school. (A-37, @7-14)

18. The Court never expressly stated that Mr. Plante could not assist the Defendant. (A-37)

Reasons for Granting the Writ

I. When a trial judge, after having granted a defendant's motion for rights sua sponte, fails to timely advise that defendant of his rights, the defendant's right to due process is prejudiced.

There are quite a few precedents which state, in effect, that a trial judge is not required to hold a criminal defendant's hand, and lead him through the proceedings. Indeed, the State of Tennessee cited a few, as did the Court of Criminal Appeals in its order dated January 27, 1988. McCaskle v. Wiggins, 465 US 168, 183. This defendant has never maintained that he has any Constitutional right, or Constitutionally secured right, to "receive personal instruction in courtroom procedure from the Trial Judge." But I know of no precedent which would act to prevent the Court from doing so if it desired. The defendant filed a Motion for Rights Sua Sponte (A-17-18) with the Trial Court, requesting that the

Court simply notify him when it was time to avail himself of his procedural rights. No *pro-se* litigant would seek to annoy a trial judge, thereby destroying what little comity might exist between him and the judge. Therefore, in an effort to avoid disrupting the judge's normal course of business, the defendant asked the Court to inform him when it was time to do things, like challenge the State's prima-facie case. The judge could have denied the motion, using McCaskle, supra, as his authority. But he granted that motion. And he failed to timely advise the Defendant of three principle occasions: the time to argue his motion to dismiss, the time to challenge the State's prima-facie case, and the time to present his closing argument to the trier of fact, pursuant to Rule 29.1(a), Tenn. R. Crim. P. As a result, the Defendant never was afforded the opportunity to challenge the State's prima-facie case, his Motion to Dismiss was denied without the trial court's ever having heard his timely-demanded oral

argument, and he was never afforded the opportunity to argue what the facts had shown.

The Court of Criminal Appeals apparently misunderstood the nature of the issue on appeal, and ruled that the trial court didn't have to guide the defendant through the proceedings, citing McCaskle, supra. (A-8, 8-13) The Defendant already knew that. The issue appealed was that once the Trial Judge agreed to notify the defendant of his procedural rights, that he should either have abided by his own ruling and done so, or notified the Defendant that the ruling was vacated, and that he was on his own. I present that question now to this Honorable Court.

II. When a defendant in a criminal trial, appearing in propria persona, timely demands that a layman be allowed to assist him, the trial judge's denial of that demand prejudices the defendant's right to the assistance of counsel.

The Defendant filed a Motion for Non-Bar Counsel of Choice with the trial court, which was denied. This High Court has long maintained and supported the right of a defendant to the assistance of counsel, pursuant to Amendment VI of the Constitution of the United States. Again, I believe some misunderstanding has occurred in the lower courts as to just what was demanded. The defendant did not demand to be "represented" by a layman. (He did request lay representation at the hearing on the Motion for New Trial, but the mistake was quickly corrected. See A-37 @ 2-14) But both the Circuit Court of Hardeman County and the Court of Criminal Appeals appear to have construed the Motion to be

of that character. In its opinion, the Tennessee Court of Criminal Appeals says:

> "The defendant claims he has a constitutional right to counsel of his choosing and says the trial court's refusal to allow him to use non-lawyers to represent him was a denial of his constitutional right." (Opinion of the Court of Criminal Appeals, p. 3)

Let me make it abundantly clear to this court, so that there is no misunderstanding: I did not ask for lay *representation*. I wanted lay *assistance*. And that's what I asked for. (See: Motion for New Trial, Record, p. 13-23; Motion for Non-Bar Counsel, Record p.13, Appendix, p. A-14.) I wanted assistance in keeping a flow sheet of testimony, to be used on cross-examination; assistance in keeping papers in order; and consultation from time to time via the whispered word. The Memorandum of Law submitted with the Motion for Non-Bar Counsel built the argument from bedrock, since the Court shouldn't rely on a layman's naked allegations of the law. The difference between "Counsel" and

"Attorney" were discussed, and the historical roots of the 6th Amendment were cited. Precedent was cited for the layman to appear in court *in propria persona*. The "counsel issue" cases were cited: Johnson v. Avery, 393 US 493; Faretta v. California, 422 US 807; US v. Dougherty, 473 F2d 1113; Trainmen v. Virginia Bar, 377 US 1. Among the most compelling of arguments is found in a dictum from Johnson v. Avery, 393 US 493:

> "Laymen – in and out of prison – should be allowed to act as 'next friend' to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as a member of the bar."

This Defendant believes that the principal misunderstanding arises from the use of the word "Counsel" to describe this assistant. "Counsel," at the time the Constitution was being crafted, referred to anyone a person was able to persuade to assist him. Today, it refers to a person who is an expert in law, and fully qualified to advise one on matters of law

and legal procedure. Bouvier's Law Dictionary, 1870 edition, defines the term as follows:

> "Counsel: The counsellors who are associated in the management of a particular cause, or who act as legal advisors in reference to any matter requiring legal knowledge and judgement."

So we see that, as late as 1870, the word "counsel" isn't restricted to members of the bar, although they would certainly be included. But look at the modern-day definition found in Black's Law Dictionary, 5th edition:

> "An attorney; lawyer. Member of the legal profession who gives legal advice and handles the legal affairs of a client, including, if necessary, appearing on his or her behalf..."

So that settles that! "Counsel" today means "lawyer." But "counsel" at the time the Constitution was drafted included whoever you wished to bring to court, as long as he behaved himself.

> "The first lawyers were personal friends of the litigant, brought into court

by him so that he might "take 'counsel' with them" before pleading." [Faretta v. California, 422 US 807, 820, (1974) citing 1 Pollock & Maitland *The History of English Law* 211 (2d ed. 1909)]

and

"The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedure and substantive law." ---(Faretta, supra, p. 834)

And it is that meaning and in that sense that the Defendant in the instant case demanded the "assistance of counsel" pursuant to the Sixth Amendment. Congress itself cannot change the meaning of the Constitution through legislation [Eisner v. Macomber, 252 US 189 (1920)]. Neither, then, can West Publishing Company change its meaning or intent by lexicography.

It would be a high form of irony for this Court to hold, as Mr. Justice Sutherland stated...

"Even the intelligent and educated layman has small and sometime no skill

> in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." Powell v. Alabama, 287 US @ 69

... only to have that court then deny a defendant in a criminal action the meager aid to be afforded by a (primarily) clerical assistant. Preparing for a criminal trial is extremely difficult. Even properly trained lawyers, except for the most impecunious, use paralegal assistants and clerical help in the preparation for trial, and some even bring assistants to help during the trial itself. Should a layman,

already handicapped, be denied this "tool of the trade?"

It should also be noted that the defendant even went so far as to provide the trial court with the authority it needed to discharge a disruptive assistant from the courtroom. (Record, p 20) The defendant showed the court that he understood the necessity for any person to maintain a proper and respectful demeanor before the court; that disruptive or contumelious behavior need not be tolerated by the court.

There is a pervading theory that only a licensed person can give <u>any</u> help to a litigant in a court action. The Bible tells us that the "laborer is worth his hire." If a layman doesn't want to force another man into involuntary servitude, if he can't afford to pay him what he's worth, or if he simply wants to conduct his own defense in his own way, is he then to be denied any assistance at all? This Petition for Certiorari should be granted so that this Court may

determine whether a criminal defendant may be denied a timely demand for the assistance of a "next friend" or lay assistant (NOT lay representation) pursuant to the Sixth Amendment.

III. A defendant's right to equal protection of the law has been violated when an appellate court ignores a prior decision of the State Supreme Court in interpreting a statute in the face of that defendant's timely demand for equal treatment under the law.

The Court of Criminal Appeals totally ignored the defendant's argument as to the State Supreme Court's definition of the word "overtake," within the meaning of Tennessee Code Annotated 55-5-118 (A-12, @14-16). The defendant raised the question of equal treatment under the law in his Reply to Appellee's Supplemental Brief to the Court of Criminal Appeals (p. 3) (Appendix, A-55 et seq.). The issue was not addressed in their opinion, but on petition for rehearing, the defendant again raised the specific question. The appellate court denied the motion for rehearing, stating that the defendant had raised "no new matters not previously determined by this Court."

This Court has held that the "mere fact" that a state court has overruled doctrines established by previous decisions on which a party relied does not confer appellate jurisdiction to the Supreme Court of the United States (Brinkerhoff-Faris Trust & Savings Company v. Hill (1930) 281 US 673)

The defendant was not afforded the opportunity to raise the "equal protection" question in the trial court. The Court, in failing to perform under its own order granting the defendant's motion for rights sua sponte, didn't advise the defendant of the proper time to challenge the State's prima-facie case. The issue had been raised in the defendant's Motion to Dismiss for Want of Subject Matter Jurisdiction, and was again raised in his appellate brief by the assertion that the case of Ringwald v. Beene, 92 SW2d 411 (1936) had defined the word "overtake," and that the Court of Criminal Appeals had to give it the same interpretation in the instant case, citing Mr. Justice Benjamin Cardozo:

"It will not do to decide the same question one way between one set of litigants, and the opposite way between another." Cardozo, The Nature of the Judicial Process 33 (1921)

Appellant's "Reply to Supplemental Brief of Appellee," P. 3 (Appendix, A-57)

The "mere fact" of an appellate court ignoring or changing the interpretation of a statute certainly exists, but there also exists the added fact that the defendant timely demanded equal protection of the law.

Ringwald defined the word "overtake" to mean "to come or catch up with in a course of motion." The Tennessee Supreme Court went further, and stated that the statute (TCA 55-5-117) did not encompass the passing of a stopped vehicle. (Ringwald v. Beene, 92 SW2d 411, 413 (1936) Black's Law Dictionary, 5th Edition, p. 996, uses the case to define the term "overtake." The Tennessee Court of Criminal Appeals totally ignored that definition, asserting that the defendant had argued

only that the road shoulder having been paved with gravel entitled him to pass on the right at that point on the highway (A-6, @ 4-7). Had the appellate court applied the existing definition, the defendant would've been entitled to reversal of his conviction as a matter of law, since the state failed to prove the ultimate fact that the defendant "overtook AND passed" another vehicle on the right. The fact that the defendant passed on the right was admitted. The fact that the vehicle he passed was stopped was also admitted – by the arresting officer! (Record, p 99)(A-30, @ 7).

IV. When a trial court denies a jury trial to a defendant who has been indicted by a grand jury, and where no evidence of implied consent exists upon the records of the court, the defendant's right to trial by jury has been vacated, and justice demands reversal of his conviction.

There are numerous decisions of this Court which state, in effect, that a defendant is not entitled to a jury trial for traffic offenses. The reasoning appears to be that the doctrine of implied consent into a regulated enterprise precludes the necessity for a jury trial where it is provided by statute that one is not entitled to trial by jury for small offenses. One who holds a driver's license is said to have voluntarily consented to this waiver of rights.

In the case at bar, the defendant was indicted by the Grand Jury for driving without a license (Record, p. 2). The charge was later dismissed on motion of the District Attorney General, (Record, p. 33)

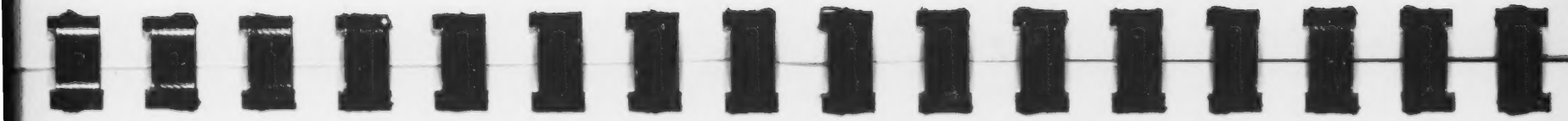
without having cited any authority in support of the motion, and with no opinion or determination having been given or made by the trial court.(Record, p. 36) No evidence of implied consent exists upon the court's record. (A-30, @ 10-17)

That the defendant insisted upon his right to trial by jury timely, and that the trial court was aware of his insistence, is affirmatively shown at Record, p. 101 (Appendix, A-35, @1-3), where the trial judge demanded the defendant show cause why he should not be held in contempt of court for publishing a newspaper article critical of the court's refusal of a jury trial in this case. The defendant again asserted his right to trial by jury in his Motion for New Trial, (Record, p. 55). He asserted it yet again at the appellate level. (Brief of Appellant, p. 25) (Appendix, A-50) The Court of Criminal Appeals stood silent with respect to the issue of the denial of a jury trial. (Opinion of the Court, A-2 – A-10)

The key point to this issue is whether the defendant was entitled to trial by jury. The Constitution of the State of Tennessee, Article I, Section 9, states that in prosecutions by indictment, the accused has the right to trial by jury. Article I, section 6 states that the right to jury trial shall remain inviolate; and Article XI, Section 16 states that the aforementioned rights are never to be violated on any pretense. It is alleged that Tennessee law forbids trial by jury for "small offenses," those being offenses for which the penalty involves no jail time, and for which the fine is not greater than $50. Tennessee law is made by the Tennessee legislature, of course. And equally obvious is the fact that the legislature derives its power to enact laws from the constitution. The legislature may not legislate beyond the limitations imposed by the document from which it derives its authority. Under the Tennessee Constitution, the defendant, properly indicted, was entitled to trial by jury upon entry of his plea of "Not Guilty." But although the court never required him to plead, it

proceeded just as if the defendant had entered a plea of "not guilty."

The Constitution of the United States, Art. III, Sec. 2, Clause 2, states that the trial of all crimes shall be by jury. This defendant was indicted by a Grand Jury. Black's Law Dictionary says that an indictable offense is "Any *criminal* offense for which a person may properly be indicted or complained of." If the defendant was properly indicted for a *crime*, and if the "trial of all *crimes* shall be by jury," then the defendant was entitled to a jury trial.



V. Where criminal actions are brought in the name of the State of Tennessee versus an individual, and where no evidence of implied consent exists, the Supreme Court of the United States has original jurisdiction of the case pursuant to Article III, Section 2, clause 2 of the Constitution of the United States of America.

I hesitate to argue this. It seems to be an affront to the dignity of this High Court to assert that you would have to try traffic tickets as a court of original jurisdiction. I assure you that no such affront, nor frivolity, is intended. But either the Constitution of the United States means what it says, or it doesn't. Article III, Section 2, Clause 2 states in pertinent part:

> "In all cases ... in which a State shall be a Party, the supreme Court shall have original jurisdiction. ..."

The Tennessee Constitution requires that,

"All writs and other process shall run
in the name of the State of Tennessee..."

The indictment (Record, p. 2) runs in the name of the State of Tennessee, and alleges offenses against the peace and dignity of that State. If the state constitution is defective for having usurped jurisdiction properly belonging to the Supreme Court, then that defect should be remedied with alacrity. If Tennessee wants its traffic tickets tried by the U.S. Supreme Court, then their choice of venue vastly exceeds the requirements of the crime. But at least a defendant in such a case would be assured of receiving the full measure of his Constitutional rights.

It is embarrassing to try to argue that the highest court in the land should even stoop to notice the substance of a traffic offense. Either you have such jurisdiction, or you do not. If you do have it, then the trial court didn't. I leave the question to you.

Conclusion

For the foregoing reasons, your petitioner Bill Horner respectfully requests that a writ of certiorari issue to review the judgement of the Tennessee Court of Appeals, and of the Tennessee Supreme Court in denying permission to appeal.

Respectfully submitted,

Bill Horner
In Propria Persona

Route 1, Box 352-3
Middleton, TN 38052
Phone: 901-376-0405

Appendix

This appendix includes material from the trial record which is believed to be relevant to the establishment of a claim to major federal questions. Page breaks are marked with bracketed figures, thus:

[1]

where those breaks occur in the original material. If the page of the record is known, the markers indicate it thus:

[1: R-10]

where the record page number is preceeded by "R-" and the first number refers to the page of the pleading as filed.

Opinion of the Court of Criminal Appeals

In The Court of Criminal Appeals of Tennessee

Jackson, October Session, 1987

STATE OF TENNESSEE, Appellee	)	C.C.A. No. 1
	)	HARDEMAN COUNTY
	)	
v.	)	Honorable Jon Kerry
	)	Blackwood, Judge
BILL HORNER	)	
Appellant	)	(Unlawfully passing a
	)	Vehicle on the Right;
	)	Failing to Display Decal
	)	Showing Payment of
	)	Vehicle Tax)

Opinion Filed: January 27, 1988

Judgement for Unlawful Passing - Affirmed
Judgement for Failure to Display Decal - Reversed and dismissed.

John K. Byers, Judge

[1]

OPINION

The defendant was convicted in a bench trial of unlawfully passing a vehicle on the right and of failing to display a decal showing payment of a vehicle tax imposed by the County Commission upon residents of the county. He was fined $5.00 on each conviction.

The defendant says the evidence was insufficient to support the conviction for illegal passing, says the stop of his vehicle was improper and thus the discovery of a lack of a decal was unlawful, says the "wheel tax" ordinance passed by the Hardeman County Court is not lawful, says he was denied counsel of his choice, and says he was deprived of due process.

The conviction for unlawful passing is affirmed. The conviction for failure to display a decal is reverse, and the charge is dismissed.

There is very little evidence in this case. It shows, however, that on the 3rd day of July 1985 two county deputies were driving along State Highway 18 in Hardeman County. They observed a vehicle stopped and preparing to making a left turn. This highway has two paved lanes for traffic and runs north and south. It has gravel upon the shoulders along the paved portion of the highway.

The deputies observed another vehicle drive off the paved portion of the highway and pass the first one on the right side by traveling upon the gravel shoulder. The officers stopped this vehicle and observed it did not bear a decal indicating payment of the wheel tax, as required by a

[2]

proper resolution of the Hardeman County Commission and the grant of authority by the Legislature by statute, T.C.A. §5-8-102. The defendant was the operator of this vehicle.

The conviction for illegally passing a vehicle is based upon T.C.A. §55-8-118(b). The statute in its entirety provides:

> 55-8-118. When overtaking on the right is permitted.-- (a) the driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
>
> (1) When the vehicle overtaken is making or about to make a left turn;
>
> (2) Upon a street or highway with unobstructed pavement not occupied by parked vehicles of sufficient width for two (2) or more lines of moving vehicles in each direction;
>
> (3) Upon a one-way street, or upon any roadway on which traffic is restricted to one (1) direction of movement, where the roadway is free from obstructions and of sufficient width for two (2) or more lines of moving vehicles.
>
> (b) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. <u>In no event shall such movement be made</u>

by driving off the pavement or main-traveled portion of the roadway.

(Emphasis added).

The defendant insists the gravel upon which he drove is part of the pavement and driving thereon did not violate section 3(b) of the statute under which he was convicted.

We do not agree with this contention. It is the general and common understanding that pavement is concrete or macadam or other solid forms and generally permanent matter is used to pave a roadway. Loose gravels as shown to be along the side of the paved portion of this highway are not considered to be pavement. We therefore conclude the evidence is sufficient for a showing that the defendant violated this statute beyond a reasonable doubt.

Contrary to the claim of the defendant, the stop of the defendant was proper in this case because the deputies stopped the defendant upon observing him violate the statute.

The defendant says that because T.C.A. S6-55-501 prohibits a municipality from passing a road or wheel tax ordinance, a county may not lawfully impose such a tax.

By T.C.A S 5-8-102 the Legislature specifically authorizes counties to pass such acts. In Adkins v. Robertson County, 201 Tenn. 596, 301 S.W.2d 337 (Tenn. 1957), the Supreme Court held T.C.A. S6-55-501 did not prohibit counties from passing such acts. Municipalities and counties are separate and distinct governmental subdivisions of the state and the Legislature may delegate certain powers to one and deny the same power to the other.

The defendant claims he has a constitutional right to counsel of his choosing and says the trial court's

refusal to allow him to use non-lawyers to represent him was a denial of his constitutional right.

A defendant may, under the constitution, represent himself. However, this grants him no right to be represented by others who are unlicensed to practice law. E.g., United States v. Martin, 790 F.2d 1215 (5th Cir. 1986), cert denied 107 S.Ct. 231.

The defendant further claims he was denied due process of law because the trial judge did not instruct and guide him in the trial. He was not entitled to this aid from the trial judge. See McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

[4]

We have examined the record in this case and considered all the arguments presented by the defendant and conclude he was properly convicted of violation of the pertinent provision of T.C.A. §55-8-118. However, we are of the view the conviction

for failure to exhibit a decal showing payment of the wheel tax may not stand.

T.C.A §55-8-102, the enabling act that permits a county to assess a use or wheel tax, provides that T.C.A. §7-51-702 shall remain in effect.

T.C.A. §7-51-702 prohibits any county or municipality from assessing any tax or levy upon any non-resident of the political subdivision as a prerequisite to driving upon the streets or roadways, etc., of such political subdivision.

The resolution passed by the legislative body of Hardeman County provides, among other things, that the tax is to be assessed upon residents of Hardeman County. The resolution further excepts from the operation of the tax highways maintained by the state.

Under the provisions of T.C.A. §§55-8-102 and 7-51-702 we conclude that in order to convict a person of violating this resolution it is essential for the

prosecution to show the accused is a resident of the county, in this case a resident of Hardeman County, and by reason of the wording of the resolution, to show the accused is operating a vehicle upon the roads and highways maintained by Hardeman County rather than by the state.

In this case, there is no proof the defendant was a resident of Hardeman County, and the only proof in the record

[5]

about the character of the highway upon which the defendant was driving is that it is a state highway. W, therefore, find the state has failed to prove that the defendant was in violation of the Hardeman County resolution, and the charge on violating the county tax on vehicles is reversed and dismissed.

/s/ John K. Byers, Judge

CONCUR:

/s/ Joe D. Duncan, Judge

(Judge Taylor did not participate in the decision in this case)

Petition for Rehearing Denied

In The Court of Criminal Appeals of Tennessee

Jackson, October Session, 1987

STATE OF TENNESSEE,	)	
Appellee	)	
	)	
v.	)	C.C.A. No. 1
	)	HARDEMAN COUNTY
BILL HORNER	)	
Appellant	)	

ORDER

The appellant has filed a petition to rehear which raises no new matters not previously determined by this Court.

The petition to rehear is therefore denied at the cost of the appellant.

ENTER this 10th day of February, 1988.

/s/Joe D. Duncan, Presiding Judge

/s/John K. Byers, Judge

Permission to Appeal Denied by Supreme Court

In The Supreme Court of Tennessee

AT JACKSON

STATE OF TENNESSEE, Appellee	)	
v.	)	HARDEMAN CRIMINAL
BILL HORNER Appellant	)	

ORDER

Upon consideration of the application of Bill Horner for permission to appeal and the entire record in this cause, the Court is of the opinion that the application should be denied.

PER CURIAM

Filed: May 9, 1988

[1 : R-13]

IN THE CIRCUIT COURT OF THE 25TH JUDICIAL DISTIRICT OF THE STATE OF TENNESSEE, IN AND FOR THE COUTY OF HARDEMAN

STATE OF TENNESSEE, Plaintiff	)	CASE NO. 4831
	)	Filed: 1-15-86
v.	)	at 11:25 AM
	)	/s/ Linda K. Fulghum
BILL HORNER, Defendant	)	Circuit Court Clerk

MOTION FOR NON BAR COUNSEL OF CHOICE

COMES NOW THE DEFENDANT, above named, in his own proper person, pursuant to Rule 12, and moves this Court to recognize his right to the assistance of counsel who is not a Bar lawyer to assist him in presenting his defense in the above-styled case, and in the alternative, to allow his non-bar assistant to sit at the cousel table with him to take notes for cross-examination, keep papers in

order, and to counsel Defendant from time to time via the whispered word.

FOR CAUSE HEREIN, Defendant shows the Court:

1. That the Constitutional guarantee to the assistance of counsel in a criminal case is unqualified within the meaning of the Sixth and Fourteenth Amendment;

2. That the United States Constitution, ordained and established by We the People for their protection against usurpation, shall not be superceded or amended by any act of Congress, or by anything in the Constitution or laws of any state;

3. That the Defendant has the First Amendment right to peaceably assemble with whomever he chosses, and that said assembly of persons has the right to speak with and redress any branch of government, including the judicial branch;

4. That Defendant refuses to waive any Constitutionally-secured right in order to assert another.

WHEREFORE DEFENDANT moves this Court for the relief sought and attaches hereto a memorandum of Points and Authorities

[2 : R-14]

in support hereof, incorporating it herein for all purposes by reference. He accepts the granting of his alternative position only as a compromise, and against his will and over his objection.

Respectfully Submitted,

/s/Bill Horner
Defendant Pro Se
Dated: 1/15/86

[1 : R-24]

IN THE CIRCUIT COURT OF THE 25TH JUDICIAL DISTIRICT OF THE STATE OF TENNESSEE, IN AND FOR THE COUTY OF HARDEMAN

STATE OF TENNESSEE, Plaintiff	)	CASE NO. 4831
	)	Filed: 1-15-86
v.	)	at 11:30 AM
	)	/s/ Linda K. Fulghum
BILL HORNER, Defendant	)	Circuit Court Clerk

MOTION FOR RIGHTS SUA SPONTE

ALL PARTIES PLEASE TAKE NOTICE, that the Defendant, above named, hereby appears in his own proper person, and moves the court to inform and remind him of proceedural rights at trial as they become available "sua sponte". Defendant is not an experienced trial practitioner, and in the "heat of battle" during trial may forget to claim a right to which he is entitled. For example, at the close of the Governments's case, criminal defendants may

approach the bench and move for a Judgement of Acquittal for Failure on the part of the State to prove its prima facie case. Should defendant forget to claim such a right, he merely asks that the Court remind him of same.

WHEREFORE DEFENDANT moves for the relief sought, demanding oral argument if the motion is not summarily granted.

Respectfully submitted,

/s/ Bill Horner
Defendant Pro Se

[1 : R-25]

IN THE CIRCUIT COURT OF THE 25TH JUDICIAL DISTIRICT OF THE STATE OF TENNESSEE, IN AND FOR THE COUTY OF HARDEMAN

STATE OF TENNESSEE,	)	
Plaintiff	)	CASE NO. 4831
	)	Filed: 1-15-86
v.	)	at 11:30 AM
	)	/s/ Linda K. Fulghum
BILL HORNER,	)	Circuit Court Clerk
Defendant	)	

MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

ALL PARTIES PLEASE TAKE NOTICE, that the Defendant, above named, hereby appears in his own proper person, and moves for dismissal of all counts on grounds that the Court lacks subject matter jurisdicition.

FOR CAUSE HEREIN, Defendant shows the Court, to wit:

1. Count I - Defendant is not subject to TCA 55-8-108. Alternatively if he is, he did not "overtake" on the right within the meaning of the law.

2. Count II - Defendant is not required to have a driver's license. A driver's license causes a free and sovereign individual to waive rights in exchange for mere privilege. Alternatively, if he is required to have said license, the arresting officer lacked probable cause to determine the existance or not existance of said license due to the impropriety of Count I.

3. Count III - Defendant is not subject to a wheel privilege tax for the same reason he is not required to have a driver's license. Alternatively, if he wuld be subject to a valid wheel privilege tax, the wheel privilege tax in question was brought into law improperly, and is void ab initio.

WHEREFORE DEFENDANT moves for the relief sought, and demand pre-trial oral argument as an alternative to the summary

[2 : R-26]

granting thereof. He incorporates herein by reference a memorandum of points and authorities in support hereof.

Respectfully submitted,

/s/Bill Horner
Defendant Pro Se

[1: R-96]

In the Circuit Court of the 25th Judicial District of the State of Tennessee

State of Tennessee Plaintiff	|	
v.	|	Docket No. 4831
Bill Horner Defendant	|	

Defendant's Amended Statement of Evidence and Proceedings of the Hardeman County Circuit Court

Comes now the Defendant in the instant case, pursuant to Rule 24(c), T.R.A.P., and states that, to the best of his knowledge and belief, the following is an accurate and correct record of the evidence and proceedings of the trial court. Note please that this is an amended statement of the evidence – the original statement was ordered to be amended by the trial court in an order dated January 26, 1987.

The defendant objects to the omission of pre-trial proceedings from the record of his conviction, and has stated his objection in an accompanying Notice of Objection.

Defendant appeared for arraignment before Judge Jon Kerry Blackwood on January 8, 1986 at the Hardeman County Court House in Bolivar, Tennessee. The following is, to the best of the Defendant's knowledge and belief, an accurate, correct and complete reconstruction of the events which transpired at that proceeding.

DEFENDANT answered and went before the bar when his name was called, accompanied by Mr. Clarence Goodrum. The Defendant was handed a copy of a Grand Jury Indictment and a court order. The State was represented by Mr. Paul Summers, District Attorney General.

THE COURT: Mr. Horner, I understand that your are defending yourself.

DEFENDANT: Your Honor, I want the Court to know that I am a natural freeborn citizen of this county with certain unalienable, God-given rights which are guaranteed by our Constitution. I do not waive any of my rights, including the right of counsel of my choice.

[2 : R-97]

MR. SUMMERS: Your Honor, the State of Tennessee does not recognize unlicensed lawyers.

THE COURT (to MR. GOODRUM): Who are you?

MR. GOODRUM: Clarence Goodrum.

THE COURT: Are you a licensed attorney?

MR. GOODRUM: No.

THE COURT: Are you representing Mr. Horner, or practicing law without a license?

MR. GOODRUM: No, Your Honor, I'm just helping him out as a friend.

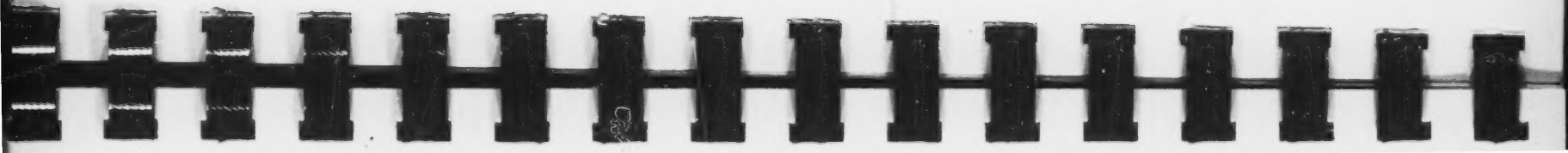
THE COURT: (Statement to the effect that Mr. Goodrum could assist the Defendant, but could not represent him.)

DEFENDANT: Your Honor, I don't want a lawyer, but I do demand all of my rights, including my right to counsel of my choice.

THE COURT: Mr. Horner, it is the duty of this Court to protect your rights, and you can have anyone you desire as your counsel. Do you have any questions?

DEFENDANT: No, thank you, Your Honor.

Defendant appeared before Judge Jon Kerry Blackwood at the Fayette County Courthouse on April 18, 1986, for the purpose of a Motions hearing.



Mrs. Elizabeth Rice appeared for the State of Tennessee. Mr. Lloyd Bauer accompanied the Defendant into court as his counsel of choice. The following is, to the best of the Defendant's knowledge and belief, an accurate, correct, and complete reconstruction of the events which transpired:

THE COURT: Mr. Horner, are you prepared to move forward?

DEFENDANT: Yes Your Honor. I want my counsel, who is here with me, Mr. Lloyd Bauer, to present the motions for me at this time.

THE COURT: Mr. Bauer, are you a licensed lawyer?

MR. BAUER: No, your honor.

[3 : R-98]

THE COURT: Then you cannot represent Mr. Horner.

DEFENDANT: Your Honor, I'm not competent to represent myself, and Mr. Bauer is quite capable.

THE COURT: The area inside the bar behind you is reserved for licensed lawyers and litigants. Everyone else stays on the other side of that bar. I will allow you to converse with Mr. Bauer over the rail from time to time, if need be, but he cannot come inside.

DEFENDANT: Your Honor, I want the record to show that I object to being denied counsel of my choice and I am moving forward against my will and over my objection.

(The Defendant then brought up the motion for Rights Sua Sponte and Trial Date Set Certain, which were granted by the Court. When the Defendant began his argument on the Motion to Dismiss for Lack of Subject Matter Jurisdiction, Judge Blackwood

interrupted and said that this evidence would be heard at the trial.)

DEFENDANT: Your Honor, are you going to let me argue the points of law mentioned in my brief in front of a jury?

THE COURT: There will be no jury trial.

DEFENDANT: I don't understand. Why will there be no jury trial?

THE COURT: You are not entitled to a jury trial.

Defendant appeared before Circuit Court Judge Jon Kerry Blackwood on May 15, 1986, at the Hardeman County Courthouse, in Bolivar Tennessee. Present were Bill Horner, Defendant and Mrs. Elizabeth Rice, Assistant District Attorney General, for the State of Tennessee.

THE COURT: Is the State ready?

MRS. RICE: Yes, Your Honor.

THE COURT: Is the Defendant ready?

[4 : R-99]

DEFENDANT: Your Honor, I have an administrative matter before we begin. I want the record to show that I've been denied counsel of my choice, and that I'm moving forward against my will and over my objection.

THE COURT: So noted.

MRS. RICE: Call Deputy Lawson.

(Deputy Lawson was sworn, and took the witness stand.)

MRS. RICE: Mr. Lawson, on July third, did you observe the Defendant do anything wrong?

DEPUTY LAWSON: Yes. Deputy Smith and I saw Mr. Horner go around another vehicle on the right side.

MRS. RICE: Where were you at the time of this observation?

DEPUTY LAWSON: We were traveling south on Highway eighteen, just north of Bolivar.

MRS. RICE: What was the vehicle that Mr. Horner went around doing?

DEPUTY LAWSON: It was stopped waiting to make a left turn.

MRS. RICE: What did you do then?

DEPUTY LAWSON: We turned around and pursued Mr. Horner. When he stopped, I asked for his driver's license. He said he didn't have one. Deputy Smith checked the front windshield for a county sticker and found he didn't have one, so I wrote a ticket for illegal passing, no driver's license, and no County sticker.

MRS. RICE: That's all I have.

DEFENDANT: Mr. Lawson, is Highway eighteen a State Highway or a county road?

DEPUTY LAWSON: It is a State highway.

DEFENDANT: Did you observe the Defendant do anything dangerous or erratic such as speed, swerve or drive wildly or anything otherwise illegal.

DEPUTY LAWSON: No, I didn't.

[5:R-100]

DEFENDANT: I show you two pictures showing a portion of a highway. Can you identify this as the area where the infraction in question occurred?

DEPUTY LAWSON: Yes. It looks like it.

MRS. RICE: May I see the pictures?

DEFENDANT: (gives photos to Mrs. Rice; she examined them and handed them back to the Defendant.)

DEFENDANT: Mr. Lawson, doesn't it look to you like the Tennessee Highway Department placed extra gravel in this area to facilitate passing vehicles which are waiting to turn left?

DEPUTY LAWSON: I don't know.

DEFENDANT: Do you suppose they did it to ease traffic congestion due to folks turning left into these businesses?

MRS. RICE: Objection.

THE COURT: Sustained.

DEFENDANT: Mr. Lawson, isn't it true that when you wrote out the ticket, the only charges were no driver's license and no county sticker?

DEPUTY LAWSON: No.

DEFENDANT: Isn't it true that you took my copy of the ticket from me at the jail and I never saw it again until traffic court?

DEPUTY LAWSON: No.

DEFENDANT: Mr. Lawson, isn't it true that you arrested me for only one reason and that's because I wouldn't place my signature on the ticket?

DEPUTY LAWSON: Yes.

DEFENDANT: I have no further questions.

MRS. RICE: The State rests, Your Honor.

THE COURT: Mr. Horner, do you have any proof?

DEFENDANT: No, your honor.

[6 : R-101]

THE COURT: Mr. Horner, will you please rise?

DEFENDANT: (rises)

THE COURT: I find you guilty in violation of TCA 55-8-118, and TCA 5-8-102. Your fine is five dollars on each charge.

THE COURT: Mr. Horner, do you hold the High Courts of the land in high esteem?

DEFENDANT: Yes, Your Honor.

THE COURT: (Cited several court cases in which the higher courts have held that in certain cases, Article 1 Section 8 of the Tennessee Constitution, which guarantees the right to trial by jury, did not apply. He then stated that a certain newspaper article, written by the Defendant and appearing in the editorial section of the Bolivar Bulletin, had been brought to his attention.)

THE COURT: Mr. Horner, can you show cause why you shouldn't be held in contempt of court?

DEFENDANT: (Explained to the Court that he had not intended to mislead anyone with the article in question) Your Honor, all I've been trying to do is defend myself, and anything that's important enough for the State to indict me on was important enough for me to defend myself on. The Constitution of the State of Tennessee and the Federal Constitution guarantees my right to trial my jury. And Article XI section 16 of the Constitution of the State of Tennessee states that the declaration of rights hereto prefixed is declared to be a part of the Constitution of this State, and shall never be violated on any pretense whatever.

THE COURT: Court is recessed.

On September 3, 1986, the Defendant again appeared in Hardeman County Circuit Court before Judge Jon Kerry Blackwood to argue a Motion for New Trial. Present at the proceedings were the Defendant, Bill Horner; James R.L. Plante as his counsel and next friend; Elizabeth Rice, Assistant District Attorney General, for the State. The following is, to the best of the Defendant's knowledge and belief, an accurate, correct, and complete reconstruction of the events which transpired:

[7:R-102]

THE COURT: State versus Horner.

DEFENDANT: (Rises from spectators section, and he and Mr. Plante move in front of the rail to the counsel table.)

DEFENDANT: Your Honor, I have some administrative and procedural matters before we move forward.

THE COURT: Are you Pro Se?

DEFENDANT: Well, Your Honor, that's one of the administrative and procedural matters. I'd like to introduce at this time my counsel, Mr. James Plante, and I'd like for him to represent me in this matter.

MR. PLANTE, rising: Now, wait a minute. Your Honor, I can't represent him in this matter; I'm not an attorney, nor am I his agent. I'm not a member of the bar, nor a graduate of a law school. The only thing I'm here for today is to assist Mr. Horner as his counsel of choice and next friend.

THE COURT: You can sit with him, but you can't represent him.

MR. PLANTE: Yes, Your Honor.

THE COURT: Are you ready, Mr. Horner?

DEFENDANT: Your honor, I'd like to move the court for a new trial. I never got a chance at the trial to chalienge the State's prima facie case, and argue the law. And I think I ought to have a new trial on those grounds.

THE COURT: Your motion for a new trial is overruled, Mr. Horner.

DEFENDANT: I beg your pardon?

THE COURT: Your motion is overruled.

DEFENDANT: Your honor I want the record to show that I object to this. I never got a chance to argue my case, and I think I should have a new trial.

THE COURT: If the Court of Appeals wants you to have a new trial, you'll get one. Cases like this don't usually get a hearing on a motion for a new trial.

Thus ended the proceedings of the trial court in the instant case. The foregoing is an accurate, correct, and complete statement of the proceedings to the extent of the Defendant's recollection. THIS IS NOT A VERBATIM TRANSCRIPT.

Defendant has filed Notice of Objection to the deletion of certain material in this amended statement pursuant to an order of the Circuit Court dated January 26, 1987.

Bill Horner, Defendant
In Propria Persona

Dated: April 27, 1986

Address: Route 1, Box 352-3
Middleton, TN 38052

Phone: 901-376-0405

Brief of Aant, pages 12 -13

[12]

I. The ndant's conviction should be reversed as tter of law.

TCA sectic 8-118 states as follows:

> **55-8. When overtaking on the r is permitted.**-- (a) the driver vehicle may overtake and pass uthe right of another vehicle only uthe following conditions:
>
> (1)' the vehicle overtaken is makinpout to make a left turn;
>
> (2) a street or highway with unobstd pavement not occupied by parkedcles of sufficient width for two (2)ore lines of moving vehicles in eachtion;
>
> (3) a one-way street, or upon any ay on which traffic is restricto one (1) direction of mover where the roadway is free from ctions and of sufficient width for tv) or more lines of moving vehicl

(b) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving off the pavement or main-traveled portion of the roadway. [Acts 1955, ch 329, S 17; T.C.A., S 59-818.]

In the annotations to the previous statute in the TCA , on the same page as the statute, at the first headnote, we find:

1. Application.

The provisions of the former section with reference to overtaking and passing other vehicles related to moving vehicles and the passing of a standing vehicle was not within the purview of such provisions. Ringwald v. Beene, 170 Tenn. 116, 92 S.W. 2d 411 (1936)

That 1936 decision of the Tennessee Supreme Court still stands today, and is in fact cited in Black's Law Dictionary, 5th Edition (1979), as supporting the definition of the word "overtake":

"To come or catch up with in a course of motion." Black's Law Dictionary, 5th Edition, 1979, @ page 996 citing Ringwald v. Beene, supra

The statute does state that one may not drive off of the principal pavement in order to "overtake and pass" a vehicle on the right. Defendant's exhibit #3 shows that the

[13]

State has gone to the trouble and expense of extending the principal pavement with gravel to allow one vehicle to move around another on the right side, where a vehicle is slowing or standing to make a left turn. Therefore, at the location in question, the "principal pavement" is two lanes wide in the direction of travel. The statute doesn't state that the pavement in question must be all of the same type, i.e., all asphalt, all gravel, all macadam, all concrete. The statute allows overtaking a moving vehicle where the pavement is widened for that purpose, as in a three-lane road. Nor is there any

restriction or differentiation placed upon the length of the widened pavement. Deputy Larson testified that the vehicle the Defendant stands accused of passing on the right was in fact stopped, awaiting traffic to clear in order to make a left turn. The Defendant admitted passing a vehicle on the right at the probable cause hearing on November 21, 1985. "Passing" on the right, in and of itself, is not prohibited by the statute. It clearly proscribes "overtaking and" passing, not "overtaking or" passing. Since the Defendant did not "overtake" anything within the meaning of the statute, the charge should've been dismissed as a matter of law. In the alternative, the trial Court, as trier of fact, should've found the Defendant innocent, because the State failed to sustain its prima facie case as a matter of fact.

Brief of Appellant, pp. 22-27

2. THE DEFENDANT WAS DENIED DUE PROCESS UNDER THE RULES

At the arraignment on August 1, 1985, before General Sessions Judge Morris, the Defendant came prepared dispose of the matter of a plea to the charges. He demanded a complaint and affidavit, pursuant to T.R. Crim. P. Rule 5(a), and instead received a motor vehicle citation (Record, p. 40), which he hadn't signed, and which had not, therefore, been "issued in lieu of arrest" pursuant to T.R. Crim. P. Rule 3.5 (a). The Defendant was in fact arrested. When he protested to the Court that the Constitution of the State of Tennessee guaranteed that nobody could be held to answer a criminal charge except on presentment or indictment of a Grand Jury, Judge Morris immediately launched into a probable cause hearing after determining that the Defendant wanted a Grand Jury indictment. The Defendant, being new to all this, didn't know what

was going on, and made no timely objection or notice and demand for time to prepare for such a hearing. If the Defendant had a right to such time, the Court should've at least asked him if he wanted time to prepare for the hearing. It is a point well-settled at the US Supreme Court level that the right to counsel may not be waived except by "express and articulate waiver", and that a court may not impute a waiver of rights from a mute record (Carnley v Cochran, 369 US 506,516 (1962). Do all courts claiming criminal jurisdiction have a duty to protect the rights of the accused? This Defendant has little personal experience upon which to base such an assertion, but Judge Blackwood claimed that he had such a duty.

> "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it -- the threshold requirement for an intelligent decision as to its exercise."

Miranda v. Arizona, 384 U.S. 436, p.467-468 (1966)(emphasis added)

[23]

Clearly then the Supreme Court, concerned here with statements made during a police interrogation, intended that a person be made aware of his rights "as a threshold requirement" before an intelligent waiver could be inferred. How much more important to the interests of due process and justice can it be for a criminal defendant to be made aware of his procedural rights before an inference is made that he has waived them? Such assumptions might be reasonable when the accused is represented by a licensed attorney, but this Defendant appeared in his own proper person at all stages of the proceedings. It is unreasonable for a person to spend $5000 defending against a $5 fine, even if the person can easily afford it. But are the basic principles of justice to be perverted just because the "intrusion is modest"? This Defendant did not commit a crime.

Yet, through his own ignorance of the judicial process, he stands convicted of two of them. The lower courts at all stages of these proceedings seemed to be concerned only with unearthing evidence or testimony which would, when coupled with the Defendant's ignorance of procedure, incriminate him.

"Justice must satisfy the appearance of justice." Offutt v. U.S. 348 U.S. 11

Has the appearance of justice been satisfied in the instant case? The Defendant doesn't think it has. The court, when reading this brief, will see that there are no references made to transcripts of the proceedings -- because there are none. The "electronic record" commanded to be made and preserved by T.R. Crim. P. Rule 5.1 (a) is unintelligible, and no transcript can be made from it. No record is availible of the arraignment proceedings, as commanded by T.R. Crim. P. Rule 11 (g), so there's no affirmative way for the Defendant

to prove that he never entered a plea, nor that he was never asked to plead at the presentation of the indictment on January 8, 1986. Thanks to the lack of an intelligible record, no affirmative proof can be

[24]

offered that General Sessions Judge Morris never took, or officially entered, a plea from the Defendant. Nor did the Circuit Judge Blackwood request that the Defendant plead to the charge before the trial. No verbatim record of the proceedings was made at the motions hearing, as commanded by T.R. Crim. P. Rule 12 (g), so this Defendant cannot present an affirmative claim that his motion for Rights Sua Sponte was granted, since the Order at Record p. 36 is silent with respect to its disposition. Indeed, that order at Record p. 36 is interesting: it shows that the Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction "will be denied." But again, no affirmative defense can be raised to prove this contention, because T.R. Crim. P. Rule 12 (g) was

ignored, so we can't prove with a positive record that the motion wasn't ruled upon before the trial. The phrase "will be denied" does lend strength to my position that it wasn't ruled upon at the motions hearing, and is testimonial to the fact that T.R. Crim. P. Rule 12 (e) didn't receive full compliance, either. The court, under that rule, may defer a determination on a motion "for good cause". Further, where factual issues are involved the court shall state its essential findings on the record. There isn't any record. Just to beat that dead horse a little more, it strikes this Defendant as strange that the court would decide to rule on a motion without hearing argument concerning it, especially where oral argument is specifically demanded. (Record, p. 30) Does this proceeding thus far "satisfy the appearance of justice"? The only way this Defendant can prove anything is by generating his own transcript to the best of his recollection. If there's anything in it with which the local powers disagree, or which casts them into an unfavorable position, they can simply

disagree by motion, and amend it any way they wish. In that manner, they present to an Appellate Court a contested issue of fact.

This Defendant could extend human understanding to the failure of the recording device at one proceeding; two unrecorded proceedings would lead us to

[25]

charge the persons responsible for the shortcoming with irresponsibility. But there is NO verbatim record of any part of any judicial proceeding in this matter. Does this satisfy the appearance of justice?

The defendant was denied the right to trial by jury.

It will doubtless be brought up that the Rules of Criminal Procedure say that no jury trial will be afforded against small offenses. The TCA itself is cited as authority for the rule. But the Tennessee

State Constitution states that "the right to trial by jury shall remain inviolate..." Tenn. Const. Art. I, section 8 and the United States Constitution says "The trial of all Crimes, ...shall be by Jury." U.S. Const. Art. III, Section 2, Clause 3. But the Tennesee Code Annotated says you can't have a jury trial if your crime is small. To resolve any conflict between TWO constituions as against one act of the legislature, let's refer again to Miranda v. Arizona:

> "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Miranda v. Arizona, 384 US 436, 491 (emphasis added)

Is the appearance of justice satisfied?

3. THE TRIAL COURT FAILED TO ADVISE THE DEFENDANT OF HIS PROCEDURAL RIGHTS TIMELY.

After having granted the Defendant's Motion for Rights Sua Sponte, the trial court did not advise him of his procedural rights during the trial as promised. Picture, if you will, the contrast between the Judge

and the Defendant. The Judge comes to work Monday morning, slips into his robe, and assumes the bench as a matter of course, like slipping on an old, comfortable jacket. It's an environment with which

[26]

he's intimately familiar. If he's like most of us, his job's lost some of its majesty and much of it's former glamor. Now it's just a job.

The Defendant, on the other hand, approaches his job as a pilot with much the same kind of ennui. No longer of the silk-scarf and goggle age, the airplane to him has become just another mode of transportation. He inspects the plane, starts the engine, and takes off for his destination in full confidence and control; everything is by now second nature.

If we were to place each of these men in the other's professional arena, I doubt if either would

approach the situation less than carefully and with respectful apprehension. The new pilot's radio calls are usually without fail made in a high-pitched voice, are mis-phrased, and more often than not, out of place. The penalty for the new pilot's shortcomings can be death. The penalty for a pro-se litigant's failure can be the death of his personal reputation and good name.

This Defendant obtained from the trial court a promise that it would advise him when it was time to do the things he needed to do. That's the only burden assumed by the court in granting such a motion -- only notification that a right is availible, not how or wheather the Defendant must exercise it, or the consequences for failure to exercise it. Just as the student pilot relies on his instructor to tell him when to make his radio calls, (but not how to make them), so was this Defendant relying on the trial judge's promise to advise him of when to argue his (deferred) motion to dismiss for lack of subject

matter jurisdiction (Record, p. 25-30), and when to challenge the state's prima-facie case. The judge did ask him wheather he had any proof, and in the Defendant's mind, this refers to evidence or testimony, not to argument or challenge.

[27]

The judge promised to advise him of his rights, and then let him down. Not, I think, out of malice or ill-will, but out of long and familiar habit. The Motion for Rights Sua Sponte is not, I'm given to understand, one commonly placed before a trial court. Almost a month elapsed between the Motions hearing at which the motion was granted, and the trial at which it was needed. The Court probably just forgot about it, but it cost this Defendant substantially all of his defense against the charges.

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Comes now the Appellant, pursuant to T.R.A.P. Rule 27(c), and submits this reply to the State's supplemental brief, which was served on the Appellant on October 22, 1987.

The Defendant would respectfully submit reply to only one issue raised in the State's supplemental brief: That of distinguishing Ringwald v. Beene, 170 Tenn. 116 (1936) with respect to wheather the vehicle is *parked* in the roadway, or merely *stopped*.

With respect to the operation of the statute, TCA § 55-8-118, it does not matter whether the vehicle is permanently disabled or only temporarily stopped. The Court in Ringwald, in addressing the definition of the word "overtake," concerned itself with the relative motion of the two vehicles. If "overtake" means "To come or to catch up with, in a

course of motion," then the vehicle must be moving in order for one to overtake it. This contention is further borne out, just one line down when you read the decision, by the following statement:

> "The statute moreover refers to the passing of a 'vehicle proceeding.' Passing a standing vehicle was not within the purview of this provision."

This decision, of course, addresses the provisions of the previous section of the TCA, §55-8-117:

> **55-8-117. Overtaking a vehicle on the left.** – The following rules shall govern the overtaking and passing of vehicles proceeding in the
>
> [3]
>
> same direction, subject to those limitations, exceptions, and special rules hereinafter stated:
>
> (1) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the

roadway until safely clear of the overtaken vehicle.

(2) Except when overtaking and passing on the right is permitted, the driver of an overtaking vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

The Appellant respectfully submits that neither the legislature nor the Court could contemplate the word "overtake" to mean one thing in §117, and another thing altogether in §118. If it means to "catch up with" a "vehicle proceeding in the same direction" in one place, it must mean the same thing the next time it is encountered. Or else, the Honorable Mr. Justice Benjamin Cardozo was wrong when he wrote:

"It will not do to decide the same question one way between one set of litigants and the opposite way between another."

Cardozo, The Nature of the Judicial Process 33 (1921)

The State remarks that "Being too impatient to wait for someone to make a left turn is an entirely different situation." We disagree. Neither the Legislature nor the Court addressed the issue of patience -- only those of propriety and safety. The State appears to try to cast the Appellant into the mold of one who is so impatient as to be careless and reckless with regard to the rights of others. I refer the Court to the Record, pp. 74 & 99 at which Deputy Lawson testified that he observed no unsafe operation. Indeed, if there had been, the Defendant-Appellant would probably have been charged with careless and reckless operation -- and properly so!

It seems to be a concern of the State that to allow the legality of the act of going around a stopped vehicle would be to invite chaotic and dangerous operating practices on our highways. Nothing could be further from the truth, and I offer the example of a man travelling along a two-lane state highway in a blinding downpour of rain -- at

the legal speed limit! Could he be charged with reckless operation? Certainly -- and he should be! The Legislature's having permitted an act does not grant license to perform that act under any conditions or circumstances. All citizens have an obligation to exercise their Constitutional rights and statutory privileges responsibly, so that in doing so, no harm comes to other persons or their property. When they do not do so, the law then operates to redress the situation. Is it any more unsafe to pass a stalled vehicle on the right than it is to pass one that is merely stopped, perhaps to turn left, or maybe to converse briefly with a passing friend? Is such passing an indication of impatience, or merely of desire to get on with one's business without aggravating his fellow man? Indeed, such a practice might even be desirable: it eliminates one more stopped "target" should another motorist be less attentive, and cause a rear-end collision.

In summary, the facts of the case do not support the State's allegation that the Defendant overtook anything. They rely on TCA §55-8-118(a)(1), which authorizes overtaking and passing on the right:

> (1) When the vehicle overtaken is making or about to make a left turn.

In the instant case, the vehicle was not in the process of making a left turn, nor was he in motion "about to make a left turn." He was stopped. Whether due to an inoperative vehicle or indecision or caution is irrelevant.